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ELEVENTH REPORT ON THE DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

by

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DRAFT STATUTE OF AN INTERNATIONAL CRIMINAL COURT

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A. INTRODUCTION

1. In his three previous reports 1/ the Special Rapporteur had already studied the question of the possible establishment of an international criminal jurisdiction. At that stage the aim of these three reports was not to submit a draft statute of an international criminal court but rather to initiate a thorough discussion in the Commission on very important aspects relevant to the establishment of such a court, so that the debate could provide the Special Rapporteur with the guidelines necessary for elaborating a draft statute.

2. This report, on the other hand, offers the Commission a draft statute of an international criminal court. It is a reply to paragraphs 4, 5 and 6 of General Assembly resolution 47/33 of 25 November 1992, and supported by the report of the International Law Commission on the work of its forty-fourth session. These paragraphs read as follows:

> "The General Assembly,
>
> ...
>
> "4. Takes note with appreciation of chapter II of the report of the International Law Commission, entitled 'Draft Code of Crimes against the Peace and Security of Mankind', which was devoted to the question of the possible establishment of an international criminal jurisdiction;
>
> "5. Invites States to submit to the Secretary-General, if possible before the forty-fifth session of the International Law Commission, written comments on the report of the Working Group on the question of an international criminal jurisdiction; 2/
>
> "6. Requests the International Law Commission to continue its work on this question by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session, beginning with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the Working Group, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States, and to submit a progress report to the General Assembly at its forty-eighth session;".

3. It is against this background that this report is presented. First, it should be noted that the present draft is based on the choice whereby the court will be an organ of the United Nations. It is difficult to imagine the United Nations requesting the Commission, by a resolution, to elaborate the statute of a court that would not be an organ of the United Nations. That is why the draft does not propose any other alternative.

1/ A/CN.4/430/Add.1, A/CN.4/435/Add.1 and A/CN.4/442.

2/ Official Records of the General Assembly, Forty-seventh session, Supplement No. 10 (A/47/10), annex.

4. Moreover, this report does not intend to offer definitive solutions to a problem of great complexity. Instead, it consists of a work plan presenting the various subjects of the statute of a court. It has tried mostly to savour the spirit and approach of the Commission which has hoped for an organ with structures that are adaptable, not permanent and of a modest cost.

5. It will be noted that, for this purpose, the draft has been cut down and does not cover all the organs usually to be found in criminal jurisdictions. Hence there is no investigation organ functioning separately from the judgement organ. Every investigation chamber has a permanent vocation. That is why this draft has introduced a system in which the proceedings are urged on by the court itself, i.e., by the judgement organ, most often in the course of the hearing itself.

6. Similarly, so far as prosecution is concerned, this draft does not propose to establish a department headed by a public prosecutor, assisted by a whole army of officers which the functioning of such an organ implies. The most flexible solution, i.e. leaving prosecution in the hands of the complainant State, is preferable.

7. This last solution is far from absurd; as indicated in the commentary to the draft article on this question, 3/ it has been adopted in some criminal court drafts, where the complainant State appoints an officer, also called a "Procurator". However, a more classic alternative is also proposed in article 25, version B.

8. As for the judgement organ, it does not have a permanent composition. The judges sitting in a chamber are not always the same. They change according to the cases, the President of the court having an eminent role in this connection. He is the person who chooses from a panel which shows the group of judges appointed by the States. Only the number of judges having to sit on a given case is fixed once and for all.

9. The fact that the organs of the tribunal do not work on a full-time basis has certain implications, especially as regards the allowances paid to the judges and as regards the compatibility or non-compatibility of a judge's functions vis-à-vis other functions.

10. As for the jurisdiction of the court, the proposed draft article does not have the drive - far from it - to solve all the problems that arise from this question. It will be borne in mind that the jurisdiction of the court is not exclusive, but concurrent, each State being capable either to judge itself or to relegate a defendant to the court. This choice seems to have won the support of the majority in the Commission.

11. Moreover, this jurisdiction depends on the consent of two States: the complainant State and the State of the territory of the crime.

12. The question of ratione materiae jurisdiction is even more difficult. The Special Rapporteur hopes to reap a good contribution from the members of the Commission on this difficult and delicate question which has been debated for a

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3/ See commentary to art. 25, below.

long time without any solution emerging. No agreement has been reached on a list of crimes which should be the subject of this jurisdiction.

13. That is why, pending the existence of a criminal code, it would be one solution for the physical jurisdiction of the court to be established by special agreements between States parties, or by individual acceptance, these instruments being subject to implementation at any time.

14. Another problem is the problem of applicable penalties.

15. Generally speaking, in national law, the criminal code and the criminal jurisdiction are the subject of separate instruments.

16. As regards the matter under study, the sponsors of previous drafts did not consider it useful or timely to elaborate separate instruments for this and that question. It is in the draft statutes of the court that provision was made for the penalties and, in general, the tribunal was left to apply the penalties which it deemed appropriate without reference to any code. The present draft refers to the criminal law of one of the States concerned. This solution is admittedly imperfect but at least it refers to the law of a State.

17. Another completely different problem is how to ensure that the defendant will appear before the court. This is an important question.

18. According to the present draft, which is in line with the general opinion of the Commission, proceedings by default are not admitted in the court. If the defendant did not appear voluntarily, he must be made to appear by other means. Between States parties provision is made for a simplified rule of handing over the defendant to the court on its simple request, with, however, reservations implying respect for certain principles. Between States not parties to the statute, or between States parties and States not parties, only extradition proceedings can guarantee appearance of the defendant, if he fails to make a voluntary appearance.

19. As the court cannot conclude extradition agreements, unless it is recognized to have such authority, it would be for the State party intending to submit the case to the court, to obtain extradition of the defendant in its territory and to hand him over to the court.

20. Whatever the cooperation between the court and the States parties, or non-parties, may be, it will also be necessary to complete the draft by adding some annexed provisions.

21. You now have a summary presentation of this draft which, once again, does not claim to solve all the delicate problems caused by the creation of an international criminal jurisdiction. At most it constitutes a work plan for the Commission.

B. DRAFT STATUTE OF AN INTERNATIONAL CRIMINAL COURT

TITLE 1

Creation

1. Establishment of the court

(a) Draft article 1

22. The text of draft article 1 submitted by the Special Rapporteur reads as follows:

"Article 1

"There is established an International Criminal Court whose jurisdiction and functioning shall be governed by the provisions of the present Statute."

(b) Commentary

23. In this draft article, the adjective "criminal" is used on purpose in preference to the adjective "penal" in order to make it very clear that the court is concerned with crimes and not with ordinary offences. The court shall take cognizance only of such ordinary offences as are linked to a crime of which it is seized.

2. The court, judicial organ of the United Nations

(a) Draft article 2

24. The text of draft article 2 submitted by the Special Rapporteur reads as follows:

"Article 2

"The court shall be a judicial organ of the United Nations."

(b) Commentary

25. It is of the greatest importance for the criminal court to be an organ of the United Nations. In the opinion of the Special Rapporteur, the coexistence of the International Court of Justice and an International Criminal Court as organs of the United Nations would not be contrary to the Charter of the United Nations. Article 1 of the Statute of the International Court of Justice actually rules that the International Court of Justice shall be the principal judicial organ of the United Nations, which leaves room for another judicial organ having jurisdiction in criminal matters. This view seems to be confirmed by the recent Security Council resolution establishing an international tribunal for the prosecution of persons responsible for serious violations of

international humanitarian law committed in the territory of the former Yugoslavia. 4/

3. Seat of the court

(a) Draft article 3

26. The text of draft article 3 submitted by the Special Rapporteur reads as follows:

"Article 3

"The seat of the court shall be established at ..."

(b) Commentary

27. Establishing the seat of the court is an essentially political problem. It is for the Sixth Committee of the General Assembly to discuss the matter and to submit proposals to the General Assembly.

28. Nevertheless, the International Law Commission may, if it so desires, also discuss the problem and submit its proposals to the General Assembly.

4. Applicable law

(a) Draft article 4

29. The text of draft article 4 submitted by the Special Rapporteur reads as follows:

"Article 4

"Applicable law

"The Court shall apply international conventions and agreements relevant to the crimes within its jurisdiction (as well as general principles of law and custom)."

(b) Commentary

30. The debates of the International Law Commission have revealed that, of the sources of law that may be applied, only international conventions and agreements had not been the subject of controversy.

31. On the other hand, the general principles of law and custom have been the subject of controversy, which explains why these two sources have been placed in square brackets.

32. This approach may be restrictive perhaps out of a sense of caution. It should be noted, however, that no previous draft had restricted the law that could be applied by an international criminal court to such an extent.

4/ Security Council resolution 808 (1993), dated 22 February 1993.

33. The draft statute of an International Penal Court elaborated in 1926 by the International Law Association 5/ listed as sources of law to be applied: international treaties, conventions and declarations, international custom, general principles of law and judicial decisions as subsidiary means for the determination of rules of law.

34. According to the draft of the 1953 Committee on International Criminal Jurisdiction, 6/ the court shall apply international law, including international criminal law and, where appropriate, national law.

35. A more recent draft prepared by professor Bassiouni 7/ includes the sources listed in article 38 of the Statute of the International Court of Justice.

36. In order to remain faithful to the Working Group, the present draft article includes definitely only the conventions and agreements.

5. Jurisdiction of the court

(a) Draft article 5

37. The text of draft article 5 submitted by the Special Rappporteur reads as follows:

"Article 5

"Jurisdiction

"1. The jurisdiction of the court shall not be presumed.

"2. The court shall have jurisdiction over every individual, provided that the State of which he is a national, and the State in whose territory the crime is presumed to have been committed, have accepted its jurisdiction.

"3. Pending the adoption of a criminal code relevant to its jurisdiction, offences within the jurisdiction of the court shall be defined in special treaties between States parties, or in a unilateral instrument of a State.

5/ International Law Association, Report of the thirty-fourth Conference, 1926 (London, 1927), pp. 113-142, art. 23.

6/ Report of the 1953 Committee on International Criminal Jurisdiction, Official Records of the General Assembly, Ninth Session, Supplement No. 12 (A/2645), annex, art. 2.

7/ Association internationale de droit pénal, Nouvelles Etudes Pénales - Draft statute, international criminal court (Editions Erès, Syracuse, Italy, 1992), art. XX.

"4. Such treaties or unilateral instruments shall determine and indicate exactly the offences over which the court is recognized to have jurisdiction.

"5. The court shall not try defendants other than those within its jurisdiction, or try defendants for acts other than those for which they were prosecuted."

(b) Commentary

38. Draft article 5 deals with rationae personae jurisdiction and rationae materiae jurisdiction.

39. The jurisdiction of the court to try an individual, or its rationae personae jurisdiction, is subject to the agreement of the two States concerned: the State of which that individual is a national, and the State in whose territory the crime was presumably committed.

40. In national criminal law, there are two main rules of jurisdiction: territorial jurisdiction and personal jurisdiction.

41. Territorial jurisdiction is, of course, the rule more generally applied. It is not, however, the only one. It encompasses major exceptions in national legislations. In particular, where the honour or the basic interests of a State are at issue, such State often gives preference to the personal jurisdiction rule.

42. This draft, if it is not to be totally lacking in realism, cannot exclude one of the two rules in favour of the other. For this reason, jurisdiction should be conferred both by the State in whose territory the crime was committed and by the State of which the perpetrator is a national.

43. The question of the physical jurisdiction of the court is also very complex. A code of international crimes does not yet exist.

44. The discussions in the Commission have not made it possible to define offences within the physical jurisdiction of the court, with the exception of genocide and possibly apartheid. At this stage, the draft should not be too ambitious. The physical jurisdiction of the court should be limited to a few offences about which the international community is in broad agreement.

45. It will thus be incumbent on the Commission to indicate, if it can and in this spirit, the offences which would be within the jurisdiction of the court.

46. It is proposed here that, until such time as States parties adopt an international criminal code, offences within the jurisdiction of the court should be defined by agreements between States parties. Any State may also, at the time of its accession to the statute of the court or at any other time, define the crimes over which it recognizes the jurisdiction of the court.

47. Such a method, which seems more flexible, was proposed in the draft statute of the International Association for Penal Law, adopted in Paris on 16 January 1928 and revised in 1946. 8/

6. Jurisdictional disputes

(a) Draft article 6

48. The text of draft article 6 submitted by the Special Rapporteur reads as follows:

"Article 6

"Jurisdictional disputes

"The court shall rule on questions relating to its own jurisdiction in a case submitted to it."

(b) Commentary

49. It is a rule in international law that the judge hearing a dispute shall also be the judge of its own jurisdiction. This draft article, therefore, only applies a rule which has been in force for a long time.

7. Judicial guarantees

(a) Draft article 7

50. The text of draft article 7 submitted by the Special Rapporteur reads as follows:

"Article 7

"Judicial guarantees

"1. Everyone charged with a criminal offence shall be presumed innocent until proved guilty.

"2. Everyone shall be entitled:

- "To a fair and public hearing;

- "To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

8/ "Draft statute for the creation of a criminal chamber of the International Court of Justice", prepared by professor V. V. Pella, and adopted by the International Association for Penal Law, Paris, 16 January 1928, and revised in 1946, chap. IV; see Historical survey of the question of international criminal jurisdiction, United Nations, 1949 (United Nations publication, Sales No. 1949.V.8), annex 7.

- "To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

- "To be tried without undue delay;

- "To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it;

- "To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

- "To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

- "Not to be compelled to testify against himself or to confess guilt."

(b) Commentary

51. Draft article 7 deals with the judicial guarantees which any individual prosecuted before the court enjoys.

52. These guarantees are found in many international instruments, such as statutes of international military tribunals, especially the Charter of the Nürnberg International Military Tribunal 9/ and the Charter of the Tokyo International Military Tribunal. 10/ They are also found in the following instruments: the International Covenant on Civil and Political Rights; 11/ the European Convention for the Protection of Human Rights and Fundamental Freedoms; 12/ the Inter-American Convention on Human Rights; 13/ the

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9/ A/CN.4/368, chap. I, B, 1 (a), art. 16 of the Statute.

10/ Idem, chap. I, B, 1 (b), art. 9 of the Charter of the Tribunal.

11/ Human Rights: A Compilation of International Instruments, United Nations, New York, 1988 (United Nations publication, Sales No. E.88.XIV.1), A.3, art. 14.

12/ United Nations Treaty Series, vol. 213, p. 221, arts. 5 and 6.

13/ International Legal Materials, vol. IX, p. 673 (1970), arts. 5, 7 and 8.

African Charter on Human and People's Rights; 14/ the Geneva Conventions of 1949 15/ and their Additional Protocols of 1977. 16/

53. As the draft Code of crimes against the peace and security of mankind has not yet been adopted, it was deemed useful to devote a specific provision of the statute of the court to judicial guarantees.

14/ International Legal Materials, vol. XXI, p. 59 (1982), art. 7.

15/ Geneva Conventions of 1949, United Nations Treaty Series, vol. 75, p. 31 ff.; art. 3 (common to the four Conventions).

16/ Protocols Additional to the Geneva Conventions of 1949, of 10 June 1977, (Editions Comité International de la Croix-Rouge, Geneva, 1977), art. 75 (Protocol I) and arts. 4-6 (Protocol II).

TITLE II

Organization and functioning

8. Permanence of the jurisdiction of the court

(a) Draft article 8

54. The text of draft article 8 submitted by the Special Rapporteur reads as follows:

"Article 8

"Permanence of the court

"Although the jurisdiction of the court is permanent, it (shall not function on a full-time basis and) shall be convened only to consider a case submitted to it."

(b) Commentary

55. This draft establishes two things:

(a) The permanent nature of the jurisdiction of the court;

(b) The non-permanent functioning of all its organs.

56. If the jurisdiction of the court is permanent, it is easier to convene the court if need be.

57. If the court had been established already, it would have been possible to avoid all the delays that are facing us today in setting up a court to judge the war crimes committed in ex-Yugoslavia. Such a court would have existed prior to commission of the crimes.

58. The permanence of such a jurisdiction would not be incompatible with an intermittent functioning of its organs.

59. The present draft is an attempt to carry out these two aspects, while responding to the Commission's concern that a small, inexpensive body should be established.

9. Residence of the President and the Registrar

(a) Draft article 9

60. The text of draft article 9 submitted by the Special Rapporteur reads as follows:

"Article 9

"Residence of the President and the Registrar

"Version A

"[Only] the President and the Registrar shall reside at the seat of the court and shall exercise their functions on a full-time basis."

"Version B

"[Only] the Registrar shall reside at the seat of the court and shall exercise his functions on a full-time basis."

(b) Commentary

61. The above draft article, which provides that only the President and the Registrar (version A), or only the Registrar (version B), shall reside at the seat of the court, is also based on a concern for economy.

10. Rules of procedure

(a) Draft article 10

62. The text of draft article 10 submitted by the Special Rapporteur reads as follows:

"Article 10

"Rules of procedure

"Rules of procedure elaborated by the court shall determine the method of functioning of its various organs and their relationship."

(b) Commentary

63. Since the members of the court will not reside at its seat and convene only intermittently, to consider a case, it will be necessary for the rules of procedure to go into details on the means of establishing communication among the members of the court, especially the method of transmitting evidence and documents, so that administrative relationships among the members can be as close as possible.

11. Qualifications required

Draft article 11

64. The text of draft article 11 submitted by the Special Rapporteur reads as follows:

"Article 11

"Qualifications required

"The members of the court must be jurisconsults of high moral character and recognized competence in international law and, more specifically, international criminal law."

12. Appointment of judges

(a) Draft article 12

65. The text of draft article 12 submitted by the Special Rapporteur reads as follows:

"Article 12

"Appointment of judges

"The members of the court shall be appointed as follows:

"(a) Each State party to the statute of the court shall appoint a judge who possesses the qualifications provided for in article 11 of this statute.

"(b) The Secretary-General of the United Nations shall prepare a list in alphabetical order of the judges appointed by the States."

(b) Commentary

66. The appointment procedure proposed in this draft article avoids the need to appoint full-time judges.

67. The list referred to in paragraph (b) above shall constitute a roster from which judges shall be chosen to sit in a case, in accordance with article 14.

68. A different procedure, which would consist of the judges being elected by the General Assembly, could also be considered. Such a procedure, however, would be more appropriate if the judges were to exercise their functions on a full-time basis.

13. Election of the President and Vice-President(s)

(a) Draft article 13

69. The text of draft article 13 submitted by the Special Rapporteur reads as follows:

"Article 13

"Election of the President and Vice-President(s)

"1. The President and Vice-President(s) shall be elected by the General Assembly of Judges by an absolute majority. They shall constitute the Bureau of the Court.

"2. The Bureau shall take all decisions concerning the administrative and financial functioning of the Court."

(b) Commentary

70. A larger committee could also be established whose members would be elected by representatives of the States parties. This committee would then elect the President or Vice-President(s). It would be authorized to oversee the administrative and financial management of the court and, in particular, to hold the draft budget of the court before its submission to the General Assembly.

71. However, a structure of this kind would be too cumbersome and better suited to an inter-State court.

14. Appointment of the Registrar

Draft article 14

72. The text of draft article 14 submitted by the Special Rapporteur reads as follows:

"Article 14

"Appointment of the registrar

"On the proposal of the President, the Bureau of the Court shall appoint the Registrar in accordance with the procedure which it has itself established."

15. Composition of a chamber of the court

(a) Draft article 15

73. The text of draft article 15 submitted by the Special Rapporteur reads as follows:

"Article 15

"Composition of a chamber of the court

"1. Each chamber of the court shall consist of nine judges.

"2. If the accumulation of cases so requires, the court may establish several chambers.

"3. The President or, in his place, the Vice-President shall select the judges to sit in the chambers of the court from the list referred to in article 12.

"4. No judge from the complainant State or from the State of which the accused is a national shall be a member of a chamber which is hearing a case involving such States."

(b) Commentary

74. The number of judges constituting the court or a chamber of the court has varied depending on the plan. The plan elaborated by the International Law Association in 1926 17/ provided that the court could sit in one or more sections of five judges.

75. The draft Statute for the Creation of a Criminal Chamber of the International Court of Justice adopted by the International Association for Penal Law in 1928 and revised in 1946 provided for 15 titular and 8 supplementary members. 18/

76. The Convention for the Creation of an International Criminal Court of 16 November 1937, 19/ adopted by the International Conference on the Suppression of Terrorism, made provision for five regular judges and five deputy judges.

77. The draft Convention for the Creation of an International Criminal Court, drawn up by the London International Assembly (1943), 20/ provided that the court should consist of 35 judges and that the number could be increased as the need arose.

78. Annex I of the draft convention on the crime of genocide, prepared by the Secretary-General of the United Nations, concerning the establishment of a permanent international criminal court for the punishment of acts of genocide, provided for seven regular judges and seven deputy judges. 21/

79. Annex II of the same draft convention, concerning the establishment of an ad hoc court, provided for seven regular judges but no deputy judges. 22/

17/ See footnote 5 above, art. 14, in fine.

18/ See footnote 8 above, annex 7, art. 3.

19/ See "Historical Survey ..." (note 8 above), annex 8, art. 6.

20/ See "Historical Survey ..." (note 8 above), annex 9 B, art. 9.

21/ See "Historical Survey ..." (note 8 above), annex 12 of the volume, art. 6 of annex I to the draft convention.

22/ Ibid., art. 11 of annex II to the draft convention.

80. The Nürnberg Charter of the International Military Tribunal provided for four judges representing the Signatories to the London Agreement of 8 August 1945, each to be assisted by an alternate. 23/

81. Apart from the question of how many judges should have cognizance of a particular case, the question also arises as to whether the court might be divided into several chambers, if the accumulation of work before it so warrants. That possibility, for which provision is made in paragraph 1, should not be completely ruled out.

16. Compatibility with other functions

(a) Draft article 16

82. The text of draft article 16 submitted by the Special Rapporteur reads as follows:

"Article 16

"Compatibility with other functions

"1. Members of the court may continue to exercise the functions which they performed before their election. However, they shall not participate in any case in which they have previously been involved in any capacity whatsoever.

"2. If a judge considers that he should not sit for a particular case, he shall so inform the President."

(b) Commentary

83. As judges receive only one daily allowance, they cannot be required to abandon the functions which they previously exercised.

17. Deprivation of office

Draft article 17

84. The text of draft article 17 submitted by the Special Rapporteur reads as follows:

"Article 17

"Loss of office

"Members of the court shall not be deprived of their office unless, in the unanimous opinion of the other members, they have ceased to meet the required conditions."

23/ A/CN.4/368, chap. I, B, 1 (a), art. 2 of the Statute.

18. Diplomatic immunity

Draft article 18

85. The text of draft article 18 submitted by the Special Rapporteur reads as follows:

"Article 18

"Diplomatic immunity

"Members of the court, when travelling to or from its seat on court business, shall be entitled to diplomatic passports and, while engaged in the performance of their duties, shall enjoy diplomatic privileges and immunities."

19. Vacancy of a seat

Draft article 19

86. The text of draft article 19 submitted by the Special Rapporteur reads as follows:

"Article 19

"Vacancy of a seat

"In the event of a seat being vacated on the death or resignation of a judge or for any other cause, the State having appointed that judge shall simply provide for his replacement by way of a letter addressed to the President of the court."

20. Solemn declaration

(a) Draft article 20

87. The text of draft article 20 submitted by the Special Rapporteur reads as follows:

"Article 20

"Solemn declaration

"Every member shall, in open court, make a solemn declaration that he will exercise his functions impartially and conscientiously."

(b) Commentary

88. Instead of administering the oath to a judge when he takes office at the time of a case, the oath may be administered, once and for all, during a plenary session, to all judges who appear on the roll.

21. Allowances, emoluments and salaries

(a) Draft article 21

89. The text of draft article 21 submitted by the Special Rapporteur reads as follows:

"Article 21

"Allowances, emoluments and salaries

"1. The President of the court shall receive a special annual allowance.

"2. The Vice-President [The Vice-Presidents] shall receive a special allowance for each day that he exercises [they exercise] the functions of the President.

"3. The judges shall receive a daily allowance during the period in which they exercise their functions. They shall also receive free transport to and from the Court according to a scale set by the General Assembly.

"4. The registrar shall receive a salary.

"5. The salaries, allowances and emoluments and the running costs of the court shall be set by the General Assembly."

(b) Commentary

90. In some draft statutes, it is the States of origin which pay the travel costs and emoluments for the judges, on a scale set by the States parties.

91. Such a system, however, would be more acceptable if the court were merely an inter-State body, rather than a United Nations body.

22. Budget of the court

Draft article 22

92. The text of draft article 22 submitted by the Special Rapporteur reads as follows:

"Article 22

"Budget of the court

"The budget of the court shall be met by the United Nations as decided by the General Assembly."

TITLE III

Procedure

23. Submission of a case to the court

(a) Draft article 23

93. The text of draft article 23 submitted by the Special Rapporteur reads as follows:

"Article 23

"Submission of a case to the court

"1. A case shall be submitted to the court on the complaint of a State.

"2. (a) Any State, whether a party or not a party to the statute of the court, may, instead of having an accused person tried under its own jurisdiction, refer him to the court.

"(b) Submission by a non-party State of a complaint to the court shall imply accession to the statute of the court and to recognition of its jurisdiction in respect of the offence in question.

"(c) The complaint, addressed to the President through the Registrar, shall indicate the name and domicile of the agent who follows the procedure, takes part in the investigation and, where necessary, conducts the prosecution before the Court.

"(d) All procedural documents shall be served at the domicile of the agent or at any address which he indicates.

"3. On receiving the complaint, the President of the court shall, provided the States are not complainants, inform the State accordingly on whose territory the offence was committed and the State of which the accused is a national.

"4. The complaint shall include an exact statement of the charges and the elements on which the complaint is founded."

(b) Commentary

94. Paragraph 1 restricts the right of complaint to States. Accordingly, individuals and international organizations are excluded from this right.

95. The right of international organizations to complain was a subject of dispute in the Commission and failed to gain general approval.

96. Paragraph 2, subparagraph (a), establishes the optional and concurrent character of the court in that any State also has the right to have an accused

person tried under its own jurisdictions. It also permits access to the court by non-party States.

97. In return for the right of a non-party State to submit a case to the court, paragraph 2, subparagraph (b), creates obligations on the part of that State.

24. Intervention

(a) Draft article 24

98. The text of draft article 24 submitted by the Special Rapporteur reads as follows:

"Article 24

"Intervention

"Any concerned State may intervene in the criminal procedure, submit a memorandum and take part in the proceedings."

(b) Commentary

99. "The State concerned" must be understood to mean the State of which the offender is a national. It may also mean, provided they are not complainants, other States which are aggrieved or whose nationals are aggrieved, if those States have not made a complaint, or it could even mean the State or States on whose territories the crime was committed.

25. Prosecution

(a) Draft article 25

100. The text of draft article 25 submitted by the Special Rapporteur reads as follows:

"Article 25

"Prosecution

"Version A

"The State which brings a complaint before the Court shall assume responsibility for conducting the prosecution.

"Version B

"The prosecuting authority before the Court shall be the Prosecutor General. He shall act on behalf of all the States parties. He shall be elected by the Court [the States parties] from among the judges in the panel provided for in article 12. He shall hold office for three years."

(b) Commentary

Version A

101. This version makes the complainant State responsible for conducting the prosecution before the court. It would seem to respond to the general concern to establish a small body that would not be too costly.

102. This version has already been adopted in the Convention for the Creation of an International Criminal Court, of 1937, emanating from the International Conference on the Repression of Terrorism. 24/ It was also one of the solutions identified in the draft Statute for the Creation of a Criminal Chamber of the International Court of Justice, of 16 January 1928, 25/ whereby the Security Council which, according to the draft, is responsible for undertaking international criminal proceedings, may, if it seems it appropriate, "leave [the presentation of the accusation] to the State concerned". Furthermore, the International Law Association's draft of 1926 26/ provides that the complainant State shall appoint a "procurator or agent" to conduct the prosecution.

103. Version A seems to correspond more closely to the spirit of these draft articles.

Version B

104. Version B, however, offers another alternative which is the more classic procedure. This classic solution is to establish a prosecutorial organ, headed by a Prosecutor General.

105. It has the drawback, though, of appointing a permanent official, to head a permanent office with deputies (general lawyers, general substitutes and many junior officials). The Commission does not wish to embark upon this course.

26. Investigation

(a) Draft article 26

106. The text of draft article 26 submitted by the Special Rapporteur reads as follows:

"Article 26

"The investigation

"1. The Court, if it deems the complaint admissible, shall summon the defendant to appear before it.

24/ See note 19, supra, art. 25, para. 3.

25/ See note 8, supra, art. 25.

26/ See note 8, supra, arts. 24, 25 and 27.

"2. After examining the defendant and considering the evidence, the Court shall decide whether or not to initiate an investigation.

"3. To that end, the Court may, at any time, either on its own initiative, or at the request of the parties:

"(a) Order the disclosure and production of any document or exhibit connected with the proceedings, the production of which appears necessary in order to establish the truth;

"(b) Under the same conditions, order witnesses to attend and be examined before the Court or one or more of its members, or order that their examination be conducted through letters of request in the manner provided by territorial law and allow their deposition as evidence before the Court;

"(c) All testimony shall be in written form;

"(d) When a question arising in a case involves prolonged investigation which cannot be conducted before the Court, the Court may appoint a special committee consisting of one or more of its members in order to carry out the inquiry. The Court may act upon the report of this committee as it sees fit;

"(e) The Court, under the same conditions, may summon any person with expert knowledge, particularly in military, naval, aerial or scientific matters, in order to give evidence in any case in which the Court deems his knowledge is required for the determination of the case;

"(f) No examination of experts and no hearing or confrontation of the defence may take place other than in the presence of the counsel for the defence or the complainant or those duly convened.

"The parties undertake to provide the Court with all necessary assistance, especially in respect of the attendance of witnesses, which shall be secured, where necessary, by means of coercion, in accordance with the rules of the requested State."

(b) Commentary

107. This procedure for investigation, carried out by the court itself, at the hearing, replaces the procedure of entrusting the investigation to a permanent body, in practice the examining magistrate.

108. However, paragraph 3, subparagraph (d), provides that, if the case requires a long investigation, the court may appoint one or more of its members to carry out the investigation. This special committee is dissolved as soon as the investigation is completed, however, and is therefore not permanent in nature.

27. Judgement by default

(a) Draft article 27

109. The text of draft article 27 submitted by the Special Rapporteur reads as follows:

"Article 27

"Judgement by default

[No defendant may be judged by default]"

(b) Commentary

110. This provision is placed in square brackets. Actually the predominant view was that proceedings by default should not be permitted. However, this solution would be liable to paralyse the work of the court. It would suffice for the court to be unable to secure the appearance of the defendant.

111. Proceedings by default exist in some of the draft statutes. For example, the International Law Associations's draft statute of the international penal court, of 1926, 27/ provided for default of appearance. In such a case, the court would issue a mandat d'amener or a mandat d'arrêt and continue the proceedings, after proof of due service of the charge. The court need only satisfy itself that it has jurisdiction to hear the case.

112. The deterrent effect of an international mandat d'arrêt (arrest warrant) should not be underestimated; such a warrant would greatly limit the defendant's freedom of movement and action.

28. Handing over an accused person to the court

(a) Draft article 28

113. The text of draft article 28 submitted by the Special Rapporteur reads as follows:

"Article 28

"Handing over an accused person to the court

"1. A State party shall hand over to the court, at the request of the court, any person against whom the court has instituted proceedings for crimes that fall within its jurisdiction.

"2. The State required so to do shall, however, ensure that:

"(a) The proceedings have not been instituted on political, racial, social, cultural, or religious grounds;

27/ See note 5, supra, art. 23.

"(b) The accused does not enjoy immunity from prosecution;

"(c) The handing over would not be contrary to the legal principle of res judicata."

(b) Commentary

114. Among the States parties, it appears desirable to facilitate the conditions under which an accused person is handed over to the court.

115. However, the present draft article takes account of the concerns expressed within the Commission concerning the need to safeguard the rights of the accused. That is why the principle stated in paragraph 1 is tempered by the provisions of paragraph 2, subparagraphs (a) and (b).

116. It should be recalled that this simplified procedure contains no new elements.

117. The Draft Convention for the Creation of an International Criminal Court (London International Assembly, 1943) 28/ contained the following provision:

"The handing over of an accused person to the prosecuting authority of the ICC is not an extradition. The ICC is deemed for the purpose of this Convention a Criminal Court common to all nations, and justice administered by this Court shall not be considered as foreign."

118. Between non-party States or between a non-party State and a State party, recourse shall be had to the extradition procedure.

119. The problem would be to determine whether the court would be competent to conclude extradition agreements. It appears that it would not be so competent.

120. One solution would be to require any member State which exercises the right to institute proceedings against a person residing in a third-party State, to obtain, where the accused refuses to appear, the extradition of the accused from its territory, in order to hand him over, where necessary, to the court.

29. Discontinuance of proceedings

(a) Draft article 29

121. The text of draft article 29 submitted by the Special Rapporteur reads as follows:

"Article 29

"Discontinuance of proceedings

"The court shall discontinue its proceedings and shall order release of the accused, where the charge has been withdrawn and has not been

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28/ See footnote 20 above, art. 5.

immediately re-instituted by a State which is competent to apply for institution of the proceedings."

(b) Commentary

122. In the national law of certain countries, withdrawal of an accusation shall not automatically lead to the discontinuance of the proceedings. It shall still be necessary for the public prosecutor, the defender of law and order, to agree to discontinuing the proceedings.

123. But, in the case referred to in the article above, the fact that there is no public prosecutor responsible for defending international law and order justifies discontinuance of the criminal proceedings where the accusation is withdrawn.

30. Detention under remand

Draft article 30

124. The text of draft article 30 submitted by the Special Rapporteur reads as follows:

"Article 30

"Detention under remand

"1. The court shall decide whether a person who is brought before it shall be placed or held under arrest. It shall determine, where necessary, the conditions under which he may be released on bail.

"2. In making an arrest, the State on whose territory the seat of the Court is established shall make available to the court an appropriate place of detention and, where necessary, the requisite guards."

31. Hearings

Draft article 31

125. The text of draft article 31 submitted by the Special Rapporteur reads as follows:

"Article 31

"Hearings

"Hearings shall be public unless, because of the nature of the charge or the evidence, the Court decides otherwise."

32. Minutes of hearings

Draft article 32

126. The text of draft article 32 submitted by the Special Rapporteur reads as follows:

"Article 32

"Minutes of hearings

"1. The minutes of hearings shall be signed by the President or, in his absence, by the Vice-President or by the judge who presided over the hearings.

"2. The minutes shall include a succinct statement of the principal elements of the hearings and shall constitute the only evidence that the formalities provided for have been observed."

33. Judgement

(a) Draft article 33

127. The text of draft article 33 submitted by the Special Rapporteur reads as follows:

"Article 33

"Judgement

"1. When the prosecution and defence have presented their arguments and concluded their pleas, the President shall declare the proceedings closed.

"2. The court may render its judgement immediately, retire to hold deliberations, or set another date for delivery of its judgement.

"3. The deliberations of the court shall be confidential and the judges shall maintain the confidentiality of their deliberations.

"4. The decisions of the court shall be taken by a majority of the judges present and shall be deemed to represent the opinion of the court as a whole.

"5. All judgements of the court shall be well-founded and read out at the public hearing by the President. Only the grounds which led to the decision of the majority shall be included in the judgement. No dissenting or individual opinion shall be published or divulged in any form whatsoever."

(b) Commentary

128. Paragraph 5 deserves some explanation. Given the weight and authority attached to judgements in criminal cases, individual or dissenting opinions do not seem desirable. They weaken the authority attached to such judgements, whereas the judgements may have grave consequences in so far as they may seriously affect the personal freedom of those convicted.

34. Penalties

(a) Draft article 34

129. The text of draft article 34 submitted by the Special Rapporteur reads as follows:

"Article 34

"Penalties

"Until a code specifying the applicable penalties is adopted, the court shall apply the penalties provided for by the criminal law, namely:

- of the State of which the perpetrator of the crime is a national;

- of the State which lodged the complaint;

- of the State on whose territory the crime was committed.

[However, the death penalty shall not be applicable.]"

(b) Commentary

130. The principle of nulla peone sine lege requires that provision be made for the penalties imposed upon a guilty person before the incriminating acts were committed.

131. In the present circumstances, the absence of an international criminal code makes it necessary to refer either to the law of the State of the perpetrator of the crime, or to the law of the State which lodged the complaint, or else to the law of the State in whose territory the crime was committed.

132. It will be for the Commission to choose from among these three options.

133. The Special Rapporteur would tend to retain the law of the State of the perpetrator as the one which the perpetrator is presumed to know. However, the principle of territoriality is the ordinary law principle in criminal matters.

35. Remedies

(a) Draft article 35

134. The text of draft article 35 submitted by the Special Rapporteur reads as follows:

"Article 35

"Remedies

"Version A

"Revision shall be the only remedy against judgements pronounced by the court. Revision may take place should a fact be discovered of such a nature as to be a decisive factor, and which, before the judgement was rendered, was unknown to the court, and if the applicant is deemed unaware of the fact.

"Revisions shall be examined by the chamber of the court which rendered the judgement.

"Version B

"The remedies shall be appeal and revision.

"Revision shall be the only remedy against judgements pronounced by the court. Revision may take place should a fact be discovered of such a nature as to be a decisive factor, and which, before the judgement was rendered, was unknown to the court, and if the applicant is deemed unaware of the fact.

"Appeals shall be examined by a special chamber of the court, composed of judges who did not take part in the judgement contested.

"Revisions shall be examined by the chamber which rendered the judgement."

(b) Commentary

135. Of the two remedies provided for in the present draft article, only revision wins a substantial agreement of the members of the Court.

136. The opinion of the Commission on the subject of appeal is divided. Some believe that judgements rendered by the highest criminal court should not be submitted to appeal. Others believe, to the contrary, that respect for human rights demands that an appeal should be authorized against any criminal judicial decision. That is why versions A and B are presented.

137. In the case of revision, it must be noted that this procedure has not always been allowed. Thus, according to the Charter of the Nürnberg International Military Tribunal: "the Judgement of the Tribunal as to the guilt or the innocence of any defendant ... shall be final and not subject to review".

138. Such a provision can be explained only in relation to the circumstances, since it is quite exceptional. The result of this text is that the death penalty would not be subject to revision should a judicial error be discovered.

139. To prevent such a result, the revision procedure should be admitted in the draft.

36. Execution of sentences

(a) Draft article 36

140. The text of draft article 36 submitted by the Special Rapporteur reads as follows:

"Article 36

"Execution of sentences

"Version A

"Sentences of imprisonment shall be executed in the territory of the State of the seat of the court which shall provide an appropriate place of detention and the necessary staff and guards.

"Version B

"Sentences of imprisonment shall be executed in the territory of the State party as designated by the court upon approval of the former. The plaintiff State may not refuse to give its approval. However, the plaintiff State shall execute the sentence if it so desires.

"Version C

"Sentences of imprisonment shall be executed in the territory of the State as designated by the court upon approval of the former. However, the State of which the accused is a national may not be designated."

(b) Commentary

141. It is necessary to determine the place of detention for those sentenced. If no provision is made on this matter, every sentence would be a judgement devoid of practical application.

142. Solution A which chooses the place of the seat of the tribunal seems the most appropriate. It offers equal treatment to all prisoners.

143. None the less, the other solutions have also been proposed in drafts of the Statute.

37. Right of pardon and conditional release

(a) Draft article 37

144. The text of draft article 37 submitted by the Special Rapporteur reads as follows:

"Article 37

"Right of pardon and conditional release

"The right of pardon and conditional release shall be exercised by the State in charge of executing the sentence, after consultation with the other States concerned."

(b) Commentary

145. The term "State concerned" must be understood to mean the State on whose territory the crime was committed, the victim State or the State whose nationals have been the victims.

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ELEVENTH REPORT ON THE DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

by

Mr. Doudou THIAM, Special Rapporteur

Corrigendum

1. Page 6, paragraph 2, second sentence

The sentence should read

> It is submitted further to paragraphs 4, 5 and 6 of General Assembly resolution 47/33 of 25 November 1992, dealing with the report of the International Law Commission on the work of its forty-fourth session.

2. Page 33, paragraph 135

For members of the court

read members of the Commission

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